

Alchris Corp. d/b/a Amelio's and Anthony St. Martin. Case 20-CA-22409

January 16, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On January 3, 1990, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed exceptions and a brief answering the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,² as explained below, and to adopt the recommended Order.

The judge concluded that the Respondent did not violate Section 8(a)(1) of the Act by discharging waiter Anthony St. Martin in November 1988. In so concluding, the judge found that the General Counsel had established that St. Martin had engaged in certain concerted activities, which were implicated in the Respondent's decision to discharge him. Nevertheless, the judge found that the Respondent would have discharged him even absent his concerted activity due to other activity that was not concerted. In view of our finding set forth below that the General Counsel has failed to establish that the Respondent knew of the concerted nature of St. Martin's activities, we agree with the judge's conclusion that the Respondent did not unlawfully discharge St. Martin. Accordingly, we find it unnecessary to address the General Counsel's argument that the judge improperly assessed the concerted nature of St. Martin's activity and as a result incorrectly found that St. Martin would have been discharged in any event due to his involvement in activity that was not concerted.³

¹ The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In view of our affirmation of the judge's dismissal of the 8(a)(1) allegations, as explained below, we find it unnecessary to pass on the Respondent's contention that the staffing of the Respondent's restaurant is not a mandatory subject of bargaining, and St. Martin's complaints concerning overstaffing therefore cannot constitute protected activity under the Act. We note, however, that the phrase "protected activity" is not synonymous with the phrase "mandatory subject of bargaining" and that, in this case, the level of staffing was inextricably linked to the waiters' income.

³ Member Devaney would dismiss the complaint here for the reasons set out by the judge.

The General Counsel presents a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1) when the evidence shows that the employee has engaged in protected concerted activity—that is, the individual acts with or on the authority of other employees⁴—the employer knew of the concerted nature of the activity, and the discharge was motivated by the employee's protected concerted activity.⁵

In this case, the General Counsel has excepted to the judge's decision on the ground, among others, that the judge improperly balanced certain of St. Martin's activities that the judge found to be concerted against certain activities that he found not to be concerted in reaching his conclusion that St. Martin's discharge was not motivated by his protected concerted activity. Based on our review of the record, we find that, even assuming arguendo that all the incidents in which St. Martin participated involved concerted activity, as alleged by the General Counsel, there is insufficient evidence to show that the Respondent knew of the concerted nature of that activity when it discharged St. Martin.

In her brief on exceptions to the Board, counsel for the General Counsel fails to expressly address the issue of the Respondent's knowledge of the concertedness of St. Martin's activity, an issue that the judge in the underlying decision did not resolve. We note, however, that in her argument to the judge, counsel for the General Counsel relied on three grounds for contending that Maitre d'—Manager Constans, who effectively recommended St. Martin's discharge, had knowledge that the activity engaged in by St. Martin was concerted:⁶ (1) that employees actively discussed tip distribution at work, (2) that Constans was aware of the offsite meeting attended by waiters, and (3) that some waiters who had attended that meeting may well have informed

⁴ We disavow the judge's analysis to the extent that the judge's decision can be interpreted as requiring express authorization of St. Martin in order to find that he was engaged in concerted activity on the authority of other employees. We will find that an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group. See *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *Every Woman's Place*, 282 NLRB 413 (1986), enf'd. 833 F.2d 1012 (6th Cir. 1987).

⁵ See *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948, 971 (1985), on remand 281 NLRB 882 (1986), aff'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

⁶ Assuming arguendo that implicit in counsel for the General Counsel's argument that the Respondent engaged in 8(a)(1) misconduct not found by the judge is a contention that Constans was aware of the concertedness of St. Martin's activities, we find no merit in this rationale. There is little or no indication in the record that, when Constans complained to others that St. Martin was a "troublemaker" and was "bugging" him, Constans was referring to St. Martin's having acted in concert with other employees rather than his speaking or acting solely on behalf of himself. Nor is there any evidence that Constans, who the General Counsel concedes effectively recommended St. Martin's discharge, had any knowledge that Robert unlawfully removed the retroactive minimum wage article, which had been posted by St. Martin, from the employees' bulletin board.

Constans of its substance.⁷ By her reliance on these grounds, counsel for the General Counsel has implicitly conceded that there is no direct evidence that Constans had knowledge of St. Martin's activity being concerted; nevertheless, she contends that the evidence warrants an inference of such knowledge. We do not agree.

The General Counsel's reliance on a meeting of employees at a location other than at the Respondent's premises, and the contention that employees of opposing viewpoints may have informed Constans of what occurred at that meeting, represent no more than bald speculation, patently insufficient to fulfill the General Counsel's affirmative obligation to establish knowledge of concerted activity by the Respondent. The sole remaining evidence relied on by counsel for the General Counsel is the general claim that employees talked at work about tip-sharing at the Respondent's restaurant. In this regard, however, counsel for the General Counsel, in her argument to the judge, cites no specific testimony, nor does the record as a whole reveal, that the waiters discussed the problem of overstaffing at work (which was St. Martin's perception of the core problem), the extent of those discussions, or whether Constans overheard or participated in those discussions.⁸ We find that this observation is insufficient by itself to warrant the inference that Constans had knowledge of the concertedness of the activity engaged in by St. Martin. Compare *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046, 1049 (1985); *Baja's Place, Inc.*, 263 NLRB 881, 887-888 (1982), *enfd.* 733 F.2d 416 (6th Cir. 1984). Accordingly, we conclude that the General Counsel has failed to establish a *prima facie* case that St. Martin was discharged for protected, concerted activities within the meaning of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Alchris Corp. d/b/a Amelio's, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

⁷ We note that the General Counsel makes no contention that St. Martin's interaction with Jacques Robert, the Respondent's chef/owner/manager, should be taken into consideration as establishing an unlawful basis for Constans' decision to recommend St. Martin's discharge.

⁸ The record discloses that, when it appeared that the busboys would receive more in tips than the waiters, Constans would reduce the busboys' percentage share to avoid that result. There is no indication in the record, however, that Constans took this step in response to any concerted employee activity. It is just as likely that Constans made the adjustments on his own initiative so that the waiters (including himself) would receive more in tips than the busboys.

Lucile L. Rosen, for the General Counsel.
Russell Specter, for the Respondent.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held August 28, 1989, is based on an unfair labor practice charge filed December 29, 1988, by Anthony St. Martin (St. Martin) and on a complaint issued on February 23, 1989, on behalf of the General Counsel of the National Labor Relations Board (Board), by the Regional Director for Region 20, alleging that Alchris Corp. d/b/a Amelio's (Respondent) was engaging in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act (Act).

The complaint, as amended at the hearing, alleges that Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct: on or about September 24, 1988, Respondent's Maitre d'-Manager, Patrick Constans, "impliedly" ordered employees to cease engaging in protected concerted activities"; in mid-October 1988, Constans "threatened to discharge employees if they continued to engage in protected concerted activities"; on or about November 1, 1988, Respondent's part owner and chef, Jacques Robert, removed from the employee bulletin board an article about the retroactivity of the employee minimum wage law which had been posted as a part of the employees' concerted activities; and, on or about November 5, 1988, Respondent discharged St. Martin because, in about August through October 1988, he "concertedly complained to Respondent regarding wages, hours and working conditions of Respondent's employees." Respondent filed an answer to the complaint in which it denied committing the alleged unfair labor practices.¹

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

Respondent, a California corporation, owns and operates a restaurant in San Francisco, California, known as Amelio's. It is a small and expensive restaurant which, in addition to its kitchen staff, employs approximately 10 or 11 waiters and busboys on a regular basis. The Charging Party, St. Martin, was employed by Respondent as one of its regular waiters from May 1988 until his discharge during the first week in November 1988.²

Amelio's dining room employees, the waiters, and busboys are supervised by Patrick Constans whose title is maitre d'-manager. The complaint alleges, and Respondent's answer to the complaint admits, that Constans occupies the position of maitre d'-manager and is a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. Constans is subor-

¹ Respondent admits it meets one of the Board's applicable discretionary jurisdictional standards and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

² All dates unless otherwise specified, refer to the year 1988.

dinate to Jacques Robert, Respondent's part owner and chef, who is responsible for the overall operation of the restaurant.

Amelio's has several different dining areas: the downstairs main dining room; the Sala Rosa room which is situated to the rear of the main dining room; and three upstairs rooms for private parties. St. Martin worked almost exclusively upstairs, waiting on private parties.

Constans, in performing his duties as the supervisor of the dining room staff, verbally abuses them regularly. He has a very volatile personality, loses his temper "very easily," frequently screams and yells at employees for the slightest mistake, and on occasion engages in this conduct in front of customers. In addition, if Constans feels an employee has affronted him, he becomes extremely angry. The result is that those dining room employees who are sensitive to being verbally abused by Constans find it very difficult to work under his supervision and it is not uncommon for employees to either threaten to quit or quit on account of his abusive behavior. It is undisputed that during the time material some of the dining room employees were very unhappy about the abusive manner in which Constans treated them.

Respondent pays its dining room staff the minimum wage required by law, thus the great majority of the money they earn is comprised of the tips received from the customers whom they serve. At first each waiter kept the tips he or she received from the customers whom they personally served, and distributed a certain percentage of these tips to the busboys who assisted them in serving those customers. However, on a very slow shift, the waiters pooled their tips and divided this money equally among all the waiters employed on the shift. This pooling of tips gradually evolved into an everyday practice, and during the time material herein, it was the system used by the waiters; all of the waiters employed on a shift pooled their tips at the end of the shift and divided them equally.³ Each waiter then distributed a certain percentage of his or her tip money to the busboys and the bartender and, if there had been a large party, to the kitchen employees and the maitre d'.

During the time material some of the waiters thought Respondent employed too many waiters for the number of customers the waiters served and thought that since the waiters pooled their tips, that the inevitable effect of the overstaffing was to reduce each waiter's earnings. In this regard, the record reveals that Amelio's is a very expensive restaurant, which provides its customers with an extraordinary amount of personal service. This necessitates a large number of waiters and on some occasions necessitates even more waiters than are actually needed, in order to be sure there are sufficient waiters to serve customers who have made dinner reservations, but fail to show up for dinner. Nonetheless, some of the waiters felt that even taking into account Amelio's need to employ a large number of waiters, that Amelio's was still overstaffed and that this was adversely affecting their earnings. Indeed, because of the overstaffing, after the tip money was distributed among the waiters and busboys, it was not uncommon for the busboys employed by Respondent to receive more money in tips than the individual waiters. In order to remedy this situation, Maitre d'-Manager Constans

suggested, and virtually all the waiters agreed, that instead of the busboys receiving the usual 15-percent share of the waiters' tip money, as was customary in the industry, that they would only receive 8 percent or 9 percent so that they would not end up receiving more tip money than the waiters.

In August, after speaking with the busboys about the problem they were having concerning the receipt of their tips, St. Martin, accompanied by one of the busboys, spoke to Respondent's owner, Jacques Robert, about the problem. He told Robert it had come to his attention that quite frequently the busboys did not receive their share of the tip money from the waiters, especially when waiters were terminated or terminated their employment before giving the busboys their share of the tip money. St. Martin proposed that, rather than leaving it up to the waiters to distribute the busboys' tip money, Respondent assume the responsibility of holding the busboys' share of the tip money and distribute the money to the busboys by means of weekly checks. Robert was agreeable, but pointed out that since this proposal would be an added expense, he proposed that the waiters receive a check from Respondent only once a week for their tips, rather than twice weekly as had been the practice, and that at the same time Respondent would also issue a weekly check to the busboys for their tip money. St. Martin indicated Robert's proposal sounded fine and suggested Robert check with the other waiters to see if it was all right with them. St. Martin's proposal on behalf of the busboys, as modified by Robert, was implemented shortly thereafter.

I note there is no evidence that St. Martin ever spoke to Maitre d'-Manager Constans concerning this problem.

In mid-September most of Respondent's waiters held a meeting 1 hour before the start of their workshift. It was held at another restaurant, the Little City Restaurant, located a few doors away from Amelio's. Present were the following waiters: Vera Illing; Didier Torres; Anthony St. Martin; Carlos Velasco; Jessica Rudin; Robyn Fisher; and Jacques Fauvet. It was Torres' and Illing's idea for the employees to meet and they also contacted the employees to arrange for the meeting and they did most of the talking during the meeting. Fisher also did a lot of talking during the meeting.

The main topic discussed was the belief of some of the waiters that Constans was scheduling too many waiters and that the overstaffing had resulted in a substantial reduction in their earnings. These waiters felt Respondent should employ more busboys and fewer waiters, so there would be fewer waiters to share the pool of tips, thus increasing their individual earnings.

Also discussed was the dissatisfaction of some of the waiters about the verbal abuse they received from Constans; they complained Constans treated them in a degrading manner and felt they should not have to put up with his volatile temper. There was a suggestion by some of those present that an effort be made to persuade Respondent's owners to replace Constans as maitre d'-manager with Jacques Fauvet, the captain of the waiters. However, two of the waiters, Fisher and Velasco, disagreed with the others' assessment of Constans; they stated they were perfectly happy with the way he conducted himself.

The meeting ended with the employees not reaching any conclusions or decisions. Torres suggested that if the waiters eventually decided to take action concerning their grievances, it should be done as a group so management would not re-

³ The practice of pooling tips was adopted by the waiters without any coercion from Respondent. However, once the practice was established, Respondent informed new hires that one of the terms and conditions of their employment was to pool their tips with the other waiters (Tr. 86-87, 106-107).

tialiate against them individually. St. Martin suggested that if the waiters decided to go to management with their grievances that they should have something in writing to show management. Neither Torres' nor St. Martin's suggestion were adopted by the waiters. The waiters did not decide what, if anything, they would do about their grievances. In fact one of those present, Robyn Fisher, expressed the view that he thought things were just fine and stated that the waiters should not communicate any of their grievances to management.

St. Martin, Torres, Illing, and Velasco testified about the aforesaid mid-September meeting. The description of what occurred at the meeting is based upon those portions of their testimony which are mutually consistent. I rejected Illing's testimony that the meeting was arranged by Torres and St. Martin, and rejected her further testimony that during the meeting St. Martin proposed a solution to the waiters' overstaffing complaint, and that others present stated that his solution was a good idea, and that the meeting ended with St. Martin agreeing to act as the waiters' spokesperson in talking with management. Likewise, I rejected Torres' testimony that during the meeting St. Martin offered to find a solution to the problem of overstaffing and the distribution of the tips to the busboys, and that the other waiters designated St. Martin to be their spokesperson and agreed he would work at finding a solution to their grievances. I also rejected Torres' testimony that St. Martin stated he would speak to management about handling the busboys' tips and issuing them checks for their tips in order to protect them from being "stiffed" by the waiters. I rejected Torres' and Illing's above-described testimony because St. Martin contradicted their testimony. As I have described in detail, *supra*, St. Martin testified in effect that it was long before the mid-September meeting that he spoke to management about the busboys' problem of not receiving their tips from the waiters. Regarding what occurred at the meeting itself, St. Martin testified he was informed about the meeting by Illing⁴ and that other than suggest that the employees have something in writing to show management, if they decided to go to management with their grievances, that he said absolutely nothing during the meeting. In this regard, St. Martin testified he was a fairly new employee of Respondent and since Illing, Torres, and Fisher had been employed by Respondent for quite some time, it was those three who did most of the talking and that he just listened.⁵ He also testified that there was no response to his suggestion and that no conclusion or decision was reached by the waiters at this meeting.

In September, after the mid-September meeting, St. Martin gave serious thought to the waiters' overstaffing complaint and the adverse effect of overstaffing on the waiters' earnings, and, after considering the problem, devised a mathematical formula which he felt would solve the overstaffing problem and result in increased earnings for the waiters. He showed this formula to the more experienced waiters and

asked waiters Illing and Torres if they thought his formula should be presented to management. Torres and Illing each answered in the affirmative; Torres verbally and Illing by nodding her head.⁶

Late in September, on the same day Illing and Torres indicated they thought he should present his formula to management, St. Martin showed it to Constans. He told Constans, "this is a way you can keep your waiters" and, as Constans looked at the formula, explained the formula to Constans in these terms:

We can use more busboys and fewer waiters. And this way the waiters can [get] better tips. Because the way it is now, you're losing waiters. Because they are not making enough money. . . . we serve more dinners and we make less money. I . . . used, as an example, Chris O'Brian who left for that very reason, who was an excellent waiter [and told Constans] he lost a great waiter because of [his] system. Constans responded by stating that St. Martin was very much like him, that when St. Martin believed something was not any good that, like Constans, he was honest about it and said so. [St. Martin] acknowledged that Constans' observation was correct. Constans then ended the conversation by stating, "that [St. Martin] was alot like him in that sense, but that [St. Martin] talked too much."⁷

As I have found, *supra*, to ensure that the waiters earned more money in tips than the busboys, the waiters agreed, as suggested by Constans, that instead of giving the busboys the customary 15-percent share of the tips, that they be given a lesser percentage. One day late in September, St. Martin informed Torres and Constans that unlike the other waiters St. Martin did not want to take the busboys' tips, but wanted to continue giving the busboys 15 percent of his share of the tips. Constans replied by stating, "Fine, don't take it." Thereafter, in distributing the busboys' tips, Constans complied with St. Martin's wishes.

In approximately the middle of October, St. Martin and Constans spoke about Constans' position. This conversation was triggered by St. Martin's objection to Constans' sharing the waiters' tips. St. Martin observed that waiter Fisher, who was in the process of totaling the tips received during the shift and dividing the tips among the waiters, was allocating part of the tip money to Constans. St. Martin indicated to Constans that he did not feel this was appropriate and attempted to show that it was inappropriate for Constans to share in the waiters' tips. In this respect, St. Martin asked

⁶The findings of fact set forth in this paragraph are based on St. Martin's testimony (Tr. 169-170, 213). Illing testified that when St. Martin showed her his proposed formula, she told him she thought he should present it to management. Torres testified St. Martin showed him a copy of a proposal he wanted to present to management, but Torres testified he was unable to remember whether or not he had a discussion with St. Martin concerning the proposed solution. I credited St. Martin's aforesaid testimony because his testimonial demeanor was good when he gave his testimony.

⁷The aforesaid description of St. Martin's conversation with Constans is based on St. Martin's testimony which Constans did not contradict. I also note that when he was asked to describe the "tone" of this conversation, St. Martin testified, "I thought that there was common ground being stricken here. I thought we were learning something about each other. And it seemed open to me" (Tr. 176). In this respect, St. Martin also testified, "I felt we were getting a common ground here . . . I actually enjoyed it. Because it was like man to man. . . . we are getting to know each other. . . . All right, I don't like bullshit, you don't like bullshit." (Tr. 214-215).

⁴I also note that Torres contradicted Illing's testimony that it was Torres and St. Martin who arranged for the meeting.

⁵Indeed, St. Martin testified that as of the time of the meeting he had very little knowledge about the waiters' main complaint, the one involving the overstaffing of waiters, because he spent most of his worktime serving private parties in the banquet rooms all by himself. Therefore, while he had been aware of the overstaffing on the few occasions when he worked downstairs in the main dining rooms, he testified that the complaints of the other waiters about overstaffing was "not a great concern of mine."

Constans, "You're maitre d' right?" Constans answered "no." St. Martin stated, "Wait a minute, maybe I'm not speaking clearly . . . you are the maitre d' yes." Constans replied by stating, "I'm the maitre d' to the customers. But I'm not maitre d' to you." St. Martin then asked, "What are you?" Constans stated he was "a waiter." St. Martin asked why, if Constans was only a waiter, he was not present for work at 4 p.m., the start of the shift. Constans stated that if he were to work a full shift that one of the waiters would lose his or her job, but stated he was making the same wages as the other waiters and that he did the same work they did and that he was only the maitre d'-manager to the customers. St. Martin disagreed; he stated that it appeared to him that Constans was definitely the maitre d' because Constans supervised the dining room staff and told the employees where to work and performed the other duties usually performed by a maitre d'.

In approximately mid-October an altercation occurred between Constans and St. Martin. General Counsel's witness, St. Martin, and Respondent's witnesses, Constans and Dennis O'Connor, who during the time material was employed by Respondent as a bartender, testified about it. O'Connor testified that Jacques Robert, Respondent's owner, and Constans were in the bar speaking to waiter Robyn Fisher about poor service at one of Fisher's tables and that the conversation was mostly between Robert and Fisher and that Fisher was not being "attacked." He further testified that St. Martin, who was within hearing distance in the kitchen, interjected himself into the conversation by yelling out that Constans should leave Fisher alone. This, O'Connor testified, aggravated Constans, who responded by yelling back at St. Martin and going into the kitchen to confront St. Martin. O'Connor further testified that Robert had to go into the kitchen in order to calm them down. Robert was not called to testify about this occurrence. Constans' testimony was vague and evasive. He testified he only "vaguely" recalled the occurrence. Specifically he testified he was in the bar when Robert was talking to Fisher about a service problem and that St. Martin, who was in the kitchen, said something which Constans was unable to recall. Constans further testified that at the time he was doing some work at the bar and, in connection with that work, went into the kitchen and when he entered the kitchen he did not intend to engage in any kind of conflict with St. Martin, but went there to do his work. Constans was not able to recall whether or not he exchanged words with St. Martin while in the kitchen. St. Martin, on the other hand, testified that he overheard Constans criticizing Fisher in connection with Fisher's work and in doing so was screaming at Fisher, so, St. Martin testified, he interjected by telling Constans that Constans could not go around yelling at people, and Constans responded by yelling at St. Martin.

I credit St. Martin's testimony that he heard Constans criticizing Fisher concerning something Fisher had done at work, and that Constans was screaming at Fisher, and that St. Martin broke into the conversation by telling Constans that he could not go around yelling at people, and Constans responded by yelling at St. Martin. I credited St. Martin's description of this incident, rather than O'Connor's or Constans', because his testimonial demeanor, which was good, was better than O'Connor's and Constans', when they testified about the incident. I also considered that O'Connor

and Constans failed to corroborate one another, but gave different descriptions of what occurred, and that Respondent's owner, Robert, was not called by Respondent to testify about this incident, warranting the inference that his testimony would not have corroborated either O'Connor's or Constans'. It is for these reasons that I have credited St. Martin's rather than O'Connor's or Constans' testimony.

Later the same evening, after St. Martin had criticized Constans for yelling at waiter Fisher, O'Connor told St. Martin that O'Connor thought, "that [St. Martin] was aggravating [Constans] on purpose and stirring up shit." St. Martin neither admitted nor denied he was purposely aggravating Constans. He responded to O'Connor's accusation by stating, "shit needed to be stirred up and he was the person to do it."⁸

In the middle of October, waiter Robert Chabrefy entered the Sala Rosa dining room and overheard Constans complaining about St. Martin to "Emmanuel" and Jacques Fauvet, two of the other waiters. Chabrefy, whose testimony was not contradicted by Constans, testified Constans was "screaming" that "he was sick and tired of working with [St. Martin]," that "he was tired of him interfering in his business, interfering in the organization of the restaurant," and stated that either St. Martin would be fired or Constans would quit, that "it's going to me or him."

On November 1, an article appeared in a local newspaper announcing that the State of California had passed a law raising the minimum wage paid to certain employees, including restaurant workers, from \$4.25 to \$4.50 an hour and stated that this increase was retroactive to July 1. St. Martin brought the article into work the same day, "mentioned" it to other workers, and posted it on the restaurant's bulletin board. He posted the article on the bulletin board in order to inform the employees that a new law had been enacted which entitled them to an increase in their wages retroactive to July 1.⁹

It is undisputed that Respondent's employees were allowed by management to post whatever they liked on the restaurant bulletin board and in fact posted different kinds of notices. The only limitation imposed by management upon the employees, in this respect, was that posted materials could not be "obscene" or otherwise in bad taste. Also the employees "usually" asked Respondent's owner, Jacques Robert, for permission to post materials.

On November 1, shortly after posting the above-described newspaper article on the bulletin board, St. Martin observed that it had been removed, so he asked owner Robert if he was the person who had removed the article from the bulletin board. Robert answered "yes" and explained to St. Martin, "You don't need to do that, we know about it." St. Martin responded by stating, "yes, but it's for the employees to know." Robert replied, "you don't have to worry about it. Robyn [Fisher] is going to take care of it. If you want to know anything, you go to Robyn."¹⁰

⁸The above description of O'Connor's comment to St. Martin and St. Martin's response is based on O'Connor's uncontradicted testimony.

⁹As I have noted supra, Respondent's waiters and busboys were paid the minimum wage required by law.

¹⁰Robert testified he removed the article from the bulletin board because, "I had already seen [it] in the newspaper in the morning. And . . . I decided everything would be taken care of—was expecting questions from the employees. . . . So I instructed one of the captains to just tell everyone that every-

Between St. Martin's above-described conversation with Robert and his subsequent confrontation the next day with Constans about his retroactive pay, it is undisputed that on more than one occasion St. Martin asked Constans about "the backpay" and that Constans responded by explaining to St. Martin that he, Constans, had nothing whatsoever to do with that matter because, as St. Martin had already been told by Robert, Robyn Fisher had been assigned the job of computing the employees' backpay.¹¹

Early in November, the day after St. Martin had posted the minimum wage newspaper article on the restaurant bulletin board, St. Martin and two other waiters, Charles Ventura and Carlos Velasco, were in an upstairs banquet room having a conversation, just before the customers were expected to arrive for dinner. St. Martin was trying to persuade them that Robert did not intend to pay the employees their wage increase retroactively as required by law and told Ventura and Velasco that he thought the employees were not intelligent enough nor strong enough to confront Robert and tell him they wanted their retroactive pay.¹² It was at this point that Constans joined the group. There is no evidence that he heard what St. Martin had been saying.

Constans asked if the three waiters were ready to start serving the customers who were expected to arrive momentarily. St. Martin responded by stating that Judy, who had performed secretarial and bookkeeping work at the restaurant, no longer was employed there. Constans acknowledged this was true. St. Martin then asked, now that Judy was no longer employed, who would compute the employees' retroactive backpay which Respondent was obligated to pay under the new law. Constans in effect stated that Judy's termination would not delay employees' receipt of what they were owed. St. Martin indicated he was happy to hear this and handed Constans a piece of paper. He explained to Constans that he had set down on this piece of paper the number of retroactive hours Respondent was obligated to pay him and that it came to 71 retroactive workdays.¹³ Constans remarked that he thought this was "fine," but stated St. Martin should speak to Robyn Fisher, rather than Constans, about the matter of his retroactive pay. He explained to St. Martin that Fisher was the person who was taking care of that matter. St. Martin responded by stating "Oh, is Robyn Fisher the maitre d'?" Constans indicated that as far as he was concerned there was no maitre d'. St. Martin remarked, "Oh, there is no maitre d'," whereupon Constans started to leave the room and, as he left, stated "you're not going to start that shit again." In response, St. Martin stated "how can I start if I never stopped." He did not explain to Constans what this meant. It was at this point that Constans exited from the room.¹⁴

thing would be paid . . . [and] I just figured the problem is taken care of and there is no reason to have it [posted] there."

¹¹ Based on Constans' undenied testimony.

¹² The above description of what St. Martin stated to Ventura and Velasco is based on the testimony of Velasco, Respondent's witness. St. Martin was not questioned about the substance of the conversation.

¹³ Earlier that day St. Martin had given this same information to Robyn Fisher, the employee who had been assigned by Respondent's management to compute the number of retroactive hours for each of Respondent's employees.

¹⁴ St. Martin, Constans, and Velasco testified about St. Martin's and Constans' above-described conversation. Their testimony, in most significant respects, was mutually consistent and not contradictory. I relied on a composite of their testimony in making the above-described findings of fact.

Constans testified that immediately following his above-described confrontation with St. Martin, he went to Robert and told him he intended to quit his employment at the end of the workshift that evening. He testified he told Robert, "this is it. I'm finishing my night, and I'm leaving because I'm fed up with [St. Martin]." Constans testified he offered no further explanation to Robert and Robert did not ask for a further explanation, inasmuch as customers were waiting to be served and neither Constans nor Robert had time to discuss the matter. However, as I have found *infra*, when Robert notified St. Martin about his discharge, he explained to St. Martin he was being discharged because Constans told Robert that he was not able to work with St. Martin any longer and intended to quit unless Robert terminated St. Martin, and, as I have also found *infra*, Constans admitted to Vera Illing that St. Martin had been discharged because Constans had presented an ultimatum to Robert, "it's either [St. Martin] or me." These circumstances, when coupled with Respondent's failure to call on Robert to corroborate Constans' above-described testimony and considering Constans' poor testimonial demeanor when he testified about his conversation with Robert, persuade me that when Constans went to Robert and informed him that he intended to quit his employment, he worded his statement of intent in terms of an intention to quit unless Robert terminated St. Martin.

The same evening that Constans indicated to Robert that if St. Martin was not discharged he intended to quit his employment, Robert notified St. Martin, in the presence of bartender O'Connor, that he was discharged. Robert told St. Martin he thought St. Martin was a good waiter who had done a "great job" and that Robert would give him a good recommendation, but he was being discharged because Constans had stated he could not work with him any longer and intended to quit unless St. Martin was terminated. Robert stated that because he was forced to choose between Constans and St. Martin, he decided Constans was more valuable for his business and thus would have to terminate St. Martin's employment. However, Robert also advised St. Martin that if St. Martin went to Constans and apologized and if Constans and St. Martin were able to work out their differences, that perhaps St. Martin could stay. St. Martin replied by informing Robert he did not believe Robert had given him the real reason for his termination and that he did not believe he had done anything to Constans which warranted an apology. St. Martin also informed Robert that Respondent's waiters did not earn as much money as St. Martin's girlfriend, who was employed at another restaurant, and that as far as St. Martin was concerned it was the Respondent's waiters who in effect paid all of the other employees' wages by sharing their tips with them, with Respondent paying the employees the minimum wage. Robert told St. Martin to leave the premises because he had been discharged. St. Martin did not leave and indicated that Robert would have to force him to leave. Robert asked bartender O'Connor to phone for the police, at which point St. Martin left the premises.¹⁵

¹⁵ The above description of St. Martin's termination interview is based on a composite of St. Martin's and O'Connor's testimony, except for those aspects of their testimony which differed. In those instances, I credited St. Martin's testimony because his testimonial demeanor was better than O'Connor's

Continued

Didier Torres, who was employed by Respondent as a waiter during St. Martin's employment, testified that shortly before St. Martin's discharge, Constans spoke to Torres and stated, "I'm tired of [St. Martin] bugging me, wanting me to do things his way." Torres further testified, "Patrick [Constans] was annoyed at the fact that Anthony was, you know, asking him, you know, to change things, you know, so . . . you know, it would be a nicer, you know, environment to work." It is unclear whether Torres was testifying that Constans also expressed these last statements or whether Torres was simply assuming that this was why Constans was annoyed about the fact that St. Martin was "bugging" him. Subsequently, during cross-examination, Torres in effect testified that Constans, without any further explanation, simply told Torres that, "I'm tired of Anthony bugging me, wanting to do things his way" (Tr. 119-120). Constans testified that he did in fact tell Torres he felt St. Martin was "bugging" him. I find that shortly before St. Martin's discharge that Constans told Torres that Constans "was tired of [St. Martin] bugging me, wanting to do things his way."

On several occasions prior to St. Martin's discharge, waiter Jessica Rudin overheard Constans state that St. Martin had been constantly bothering and nagging him about the following matters: Constans' role in the management of the restaurant; the busboys not getting their 15-percent share of the waiters' tips; and about Constans' role as far as "making sure that the retroactive wage would be paid." When Rudin overheard Constans make these remarks, Constans appeared to be agitated.¹⁶

On approximately three different occasions Respondent's bartender O'Connor heard St. Martin complain to Constans that "there were too many waiters scheduled on the floor" and heard Constans respond by explaining to St. Martin that often there were a substantial number of customers who had made reservations who did not show up for dinner and that it was because of this there were often too many waiters in the restaurant.¹⁷

Subsequent to St. Martin's discharge, Vera Illing, who late in September voluntarily terminated her employment with Respondent, was talking to Constans and during their conversation, when Illing asked whether any of the employees who had worked with her at Amelio's were still employed, Constans informed her about St. Martin's discharge. In informing her about St. Martin's discharge, Constans called him a "troublemaker" and a "piece of shit" and explained to Illing that he and St. Martin had an argument about Constans' position in the restaurant, namely, whether Constans was a waiter or maitre d'-manager, and that the argument ended with Constans telling Robert to make a choice between St. Martin and Constans, and he issued an ultimatum to Robert; "it's either him or me."¹⁸

After St. Martin had been employed by Respondent for approximately 2 months¹⁹ he spoke to Constans about every

second workday and complained to him that Robert was not paying the employees properly, that Robert was "ripping off everyone," and complained that the employees were paying one another, a reference to the fact that the other employees shared in the waiters' tips. In addition to these complaints, St. Martin asked Constans why the employees were not being paid properly and why Robert was not paying the cook and asked other questions of that nature. Each time St. Martin came to him with these complaints and questions, Constans told him that he should speak to Robert if he wanted to look at the restaurant's books to see how much the employees were being paid, and further advised St. Martin he should speak to Robert about his complaints and questions because he, Constans, did not care about money, that he was not a member of management and was only interested in providing good service for the customers. Nevertheless, Constans continued to direct his above-described complaints and questions to Constans which upset Constans.²⁰

Constans testified he decided to quit his employment because St. Martin was making his life miserable at work to such an extent that his job had become a "nightmare." He further testified he had felt this way about St. Martin for "one good month" prior to the day he decided to quit and that during this last month, St. Martin had also started to complain to Constans about the "retroactive pay" and that St. Martin's girlfriend, who had just started work at another restaurant as a cocktail waitress, earned more money than St. Martin. Constans testified his decision to quit his employment was triggered by the fact that even though it had been made clear to St. Martin that Fisher, not Constans, was handling the matter of the employees' retroactive pay and even though it had been made clear to St. Martin that Constans viewed himself as maitre d'-manager in name only and not for managerial purposes, that as described in detail, supra, St. Martin raised both of these subjects once again in his early November confrontation with Constans, and when Constans asked whether St. Martin intended to start discussing those matters again with him, St. Martin's reply, "how can I start if I never stopped?," led Constans to conclude that St. Martin did not intend to ever leave him alone and would never accept what Constans told him, therefore, Constans testified he decided to quit his employment and communicated his decision to Robert.

B. Discussion

1. Constans allegedly implicitly orders St. Martin to cease engaging in protected concerted activity

The complaint alleges that on or about September 24, Respondent violated Section 8(a)(1) of the Act when Constans, its maitre d'-manager, "impliedly ordered employees to cease engaging in protected concerted activities." The evidence relevant to an evaluation of this allegation has been described in detail supra, and is briefly summarized as follows. Late in September St. Martin submitted a formula to Constans which was designed to reduce the number of waiters employed regularly by Respondent, thereby increasing the earnings of the remaining waiters. In presenting this formula, St. Martin explained to Constans that by employing more busboys and fewer waiters it would enable the waiters to in-

when they testified about this interview. I also considered that Robert, Respondent's owner, was not called on by Respondent to corroborate O'Connor's testimony.

¹⁶The aforesaid description of Constans' comments about St. Martin are based on Rudin's undenied testimony.

¹⁷Based on O'Connor's undenied testimony.

¹⁸The above description of Constans' remarks to Illing are based on Illing's undenied testimony.

¹⁹St. Martin began work in May.

²⁰The findings in this paragraph are based on Constans' undenied testimony.

crease their earnings. He also pointed out to Constans that remedying the overstaffing problem would be beneficial to Respondent, as well as the waiters, because as a result of the restaurant being overstaffed with waiters, several of the waiters had quit Respondent's employ because they were not earning enough money. Constans responded by stating that St. Martin was very much like him, that when St. Martin felt something was not right, like Constans, he was honest about it and said so, but that while St. Martin was a lot like him in that sense, Constans felt that "St. Martin talked too much."

Counsel for the General Counsel contends that Constans' comment that St. Martin "talked too much," when viewed in context, was reasonably calculated to lead St. Martin to believe Constans was ordering him to cease engaging in his concerted activity of improving the waiters' earnings by attempting to persuade Respondent to employ fewer waiters. I disagree. In my opinion, when viewed in context, Constans' comment was too ambiguous and innocuous to have lead a reasonable person to believe that it constituted an order not to speak about the waiters' overstaffing complaint. There is nothing whatsoever in the record which would warrant the inference that, under the circumstances, St. Martin would have reasonably interpreted Constans' remark as an order to discontinue talking about the employees' overstaffing complaint, rather than giving the remark its normal meaning, namely, that Constans felt that St. Martin "talked too much." Moreover, I note St. Martin did not view the remark as an order to stop talking about the overtime complaint. For, in describing the "tone" of his above-described conversation with Constans, St. Martin described it in these terms: "I felt we were getting a common ground here . . . I actually enjoyed it. Because it was like man to man . . . we getting to know each other. . . . All right, I don't like bullshit, you don't like bullshit" (Tr. 176, 214-215).

It is for the aforesaid reasons that I reject the General Counsel's contention that in late September Respondent, through Constans, violated Section 8(a)(1) of the Act by impliedly ordering St. Martin to cease engaging in protected concerted activity. I therefore shall recommend the dismissal of this complaint allegation.

2. Constans allegedly threatens to discharge St. Martin for having engaged in protected concerted activity

The complaint alleges that in mid-October Respondent violated Section 8(a)(1) of the Act when Constans, its maitre d'-manager, "threatened to discharge employees if they continued to engage in protected concerted activities." The evidence relevant to an evaluation of this allegation has been described in detail, *supra*, and is summarized briefly as follows. In mid-October Constans in speaking to waiters "Emmanuel" and Jacques Fauvet "screamed" that "he was sick and tired of working with [St. Martin]," that "he was tired of him interfering in his business, interfering in the organization of the restaurant" and that either St. Martin would be fired or Constans would quit, that "it's going to be me or him." These remarks were also overheard by waiter Robert Chabrefy.

Counsel for the General Counsel contends that when the three named employees heard Constans' above threat to discharge St. Martin, that they would have reasonably concluded that Constans was threatening to fire St. Martin be-

cause of his protected concerted activity of attempting to persuade Constans to employ fewer waiters so that the remaining waiters' earnings would increase. I disagree. The plain meaning of Constans' remarks was not reasonably calculated to have lead them to believe he was threatening St. Martin with discharge for having engaged in protected concerted activity. In addition, there is no evidence whatsoever that the three employees present when Constans threatened to have St. Martin fired, when they heard Constans' remarks that St. Martin had been "interfering in his business" and "in the organization of the restaurant," "would have reasonably associated those remarks with the fact that St. Martin had been engaged in protected concerted activity. In this regard, I note that the record does not establish that any one of the three employees knew that St. Martin had spoken to Constans or intended to speak to him about the waiters' overstaffing complaint or about any other employee complaint which constituted protected concerted activity. It is just as likely that when the employees heard Constans threaten to discharge St. Martin, that they associated it with activity which was not concerted within the meaning of Section 7 of the Act, as with concerted activity. I therefore find that Constans' above-described threat to discharge St. Martin was not reasonably calculated to interfere with, restrain, or coerce employees in the exercise of their right to engage in activities encompassed by Section 7 of the Act. Accordingly, I shall recommend that this complaint allegation be dismissed.

3. Robert forbids St. Martin from posting a newspaper article on the restaurant's bulletin board

The complaint alleges, in substance, that on or about November 1 Respondent violated Section 8(a)(1) of the Act when its owner Robert removed from the restaurant's bulletin board a newspaper article posted by St. Martin which described a recently enacted law increasing the employees' minimum wage retroactively. The evidence relevant to an evaluation of this allegation has been described in detail *supra*, and is briefly summarized as follows.

Respondent maintains a bulletin board and on this bulletin board permits employees to post work-related and nonwork-related messages, with certain exceptions not pertinent to this case. On November 1 an article appeared in a local newspaper announcing that the State had passed a new law raising the minimum wage paid to employees such as restaurant workers, whose earning were mainly derived from customers' tips, and stated this increase was from \$4.25 to \$4.50 an hour and would be retroactive to July 1. Respondent's waiters and busboys were paid the minimum wage required by law and received most of their earnings from customers' tips. St. Martin brought the article to work that same day, "mentioned" it to other employees, and posted it on the restaurant's bulletin board. He posted the article on the bulletin board in order to notify the employees that a new law had been enacted which obligated Respondent to increase their wages retroactive to July 1. However, within minutes after he posted the article, it was removed from the bulletin board by Respondent's owner, Jacques Robert, who informed St. Martin that there was no need for him to post the article because Respondent knew about the law. St. Martin informed Robert that his purpose in posting the article was to notify the employees about the law. Robert assured him that waiter Fisher would take care of the matter for Respondent and that

if St. Martin wanted to know anything about the matter he should speak to Fisher. Robert testified his reason for removing the article was he had already made plans for Respondent to implement the new law and reimburse the employees as required by the law and had instructed one of his employees to inform the other employees of this. Therefore, Robert testified he felt there was no reason for St. Martin to post the newspaper article.

An employer may "uniformly enforce a rule prohibiting the use of its bulletin boards by employees for all purposes." *Vincent's Steak House*, 216 NLRB 647-647 (1975). However, it is also well-established that when an employer by formal rule or otherwise permits employees to post non-work-related messages on its bulletin board, the employer has demonstrated that its property and managerial rights are not jeopardized by employee postings. *Container Corp. of America*, 244 NLRB 318 fn. 2 (1979). Accord: *NLRB v. Challenge-Cook Bros. of Ohio*, 374 F.2d 147, 153 (6th Cir. 1967); *Arkansas-Best Freight Systems*, 257 NLRB 420, 423-424 (1981). Accordingly, an employer who permits nonwork-related use of its bulletin board by its employees violates Section 8(a)(1) of the Act, regardless of its motivation, when it prohibits an employee from using the bulletin board to post a message, provided that the employee's conduct in posting the message constitutes either union or protected concerted activity. See generally, *Honeywell, Inc.*, 262 NLRB 1402, and cases cited therein (1982), enfd. 722 F.2d 406 (8th Cir. 1983).

Applying these principles to this case, when, in derogation of its existing policy of permitting employees to post non-work-related messages on its bulletin board, Respondent prohibited St. Martin from posting the newspaper article, Respondent violated Section 8(a)(1) of the Act, if St. Martin's conduct in posting the article constituted concerted activity within the meaning of Section 7 of the Act and if Respondent knew of the concerted nature of St. Martin's activity.

The Board held in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), reaff'd. 281 NLRB 882, 885 (1986) (*Meyers II*), that "In general, to find an employee's activity to be 'concerted,' we shall require it to be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Meyers I* the Board cautioned, however, that

[t]he definition of concerted activity we set forth . . . is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law.

. . . .

We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is, at its heart, a factual one. . . . [268 NLRB at 496-497]

Specifically, in *Meyers I*, 268 NLRB at 494, and again in *Meyers II*, supra at 887, the Board reaffirmed its prior decisions holding that "the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." Thus, the "activity of a single employee in enlisting the support of

his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969), quoted with approval in *Whittaker Corp.*, 289 NLRB 933 (1988). Such individual action is concerted as long as "it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to a group action in the interest of the employees." *Meyers II*, supra at 887.

Furthermore, the object of inducing group action need not be expressed. For example, "[i]t is obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal." *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976). "[D]issatisfaction due to low wages is the grist on which concerted activity feeds." *Id.* at 919. Thus, it is settled that a single employee has a statutory right to speak to other employees about the employees' wages. *Jeanette Corp.*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976); *Super One Foods No. 601*, 294 NLRB 462 (1989); *Waco, Inc.*, 273 NLRB 746 (1984); *The Loft*, 277 NLRB 1444 (1986).

Applying the above standards, I am of the view that St. Martin was engaged in concerted activity when he posted on the restaurant's bulletin board a newspaper article concerning the enactment of a new law which obligated Respondent to raise its employees' minimum wages retroactively. St. Martin's purpose in posting the newspaper article was to aid his fellow employees by notifying them that they were entitled to have their wages raised and to have them raised retroactively under a newly enacted law. The contents of the article posted by St. Martin would have foreseeably led to the employees discussing that Respondent was required by law to grant them a pay raise and to do so retroactively. It is obvious that before Respondent's employees joined together and acted concerning Respondent's legal obligation to grant them this pay raise, that the employees first had to learn about the newly enacted law and the requirements of the law. Thus, when St. Martin posted the newspaper article which describes the law, his conduct was an indispensable preliminary step to group activity. Accordingly, I find that when St. Martin posted the newspaper article on Respondent's bulletin board on November 1, he did so "with the object of initiating or inducing or preparing for group action," thereby constituting concerted activity. I further find that because of the contents of the posted newspaper article and the fact that it was posted on the Respondent's bulletin board so that all of the employees could read it, that Respondent must have known of the concerted nature of St. Martin's activity in posting the article.

Based on the foregoing, I find Respondent violated Section 8(a)(1) of the Act on November 1 when it prohibited St. Martin from posting on its bulletin board a newspaper article describing a newly enacted law requiring Respondent to increase its employees' wages retroactively.

4. St. Martin's discharge

The complaint alleges that during the period from approximately August through October, St. Martin "concertedly complained to Respondent regarding wages, hours and working conditions of Respondent's employees" and on or about November 5 Respondent discharged him for engaging in this conduct, thereby violating Section 8(a)(1) of the Act. The

legal principles governing the disposition of this allegation and an evaluation of the pertinent evidence, in the light of those principles, follows.

The applicable legal principles governing employees' concerted activity in general and whether an employee has been discharged for engaging in this activity were set forth by the Board in *Meyers I*, 268 NLRB 493 (1984), and reaff'd. in *Meyers II*, 281 NLRB 882 (1986), and are as follows [268 NLRB at 497]:

In general to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [Footnote citations omitted.]

In *Meyers II*, supra at 868, the Board expressly held that formal agency principles are not dispositive of concertedness issues: "When the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise, we shall find the conduct to be concerted." See also *Consumers Power Co.*, 282 NLRB 130 (1986) (an individual employee's complaint to management concerning safety that had been raised in a prior group meeting was concerted without regard to whether he was joined by other employees in making the complaint or was specifically authorized by other employees to make the complaint).

In *Meyers II*, as I have discussed in a previous section of this decision, the Board made it clear that its definition of concerted activity encompassed activity which in its inception involves only a speaker and a listener so long as the communication of speaker to listener appeared calculated to initiate or induce or prepare for, or otherwise related to some kind of group action.

Under the standard established by the Board in *Wright Line*, 251 NLRB 1083 (1980),²¹ if an employee's protected concerted activity is shown to be a motivating factor in an employee's discharge, the employer will be found to have violated the Act unless the employer is able to demonstrate that the discharge would have occurred regardless of the employee's protected concerted activity.

It is also settled that an employer's motivation for discharging an employee is not necessarily found in the mind of the individual making the decision to discharge. A decision to discharge an employee based on the unlawfully motivated recommendation of a supervisor violates the Act regardless of the motivation of the decision-maker who acted on that recommendation. *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982); *NLRB v. E.D.A. Service Corp.*, 466 F.2d 157, 158 (9th Cir. 1972); *United Aircraft Corp. v. NLRB*, 440 F.2d 85, 92 (2d Cir. 1971); *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529, 531 (3d Cir. 1962).

²¹ Enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), and aff'd. by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-403 (1983).

Respondent contends the General Counsel did not make a prima facie showing that St. Martin was discharged for engaging in protected concerted activity because there was no evidence that Respondent's owner, Jacques Robert, the person who decided to discharge St. Martin, knew he had engaged in protected concerted activity and, even if there was evidence of such knowledge, there was no evidence Robert was antagonistic toward St. Martin because he engaged in the activity which the General Counsel claims was protected concerted activity. However, as described in detail supra, although Robert made the decision to discharge St. Martin, he made it based on the effective recommendation of Maitre d'-Manager Constans who Respondent concedes is a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. It was in response to Constans' ultimatum that he would quit if St. Martin was not discharged immediately, that Robert, without even bothering to have Constans explain his reason for issuing this ultimatum, abruptly decided to discharge St. Martin. Therefore, even though Respondent's decision to discharge St. Martin was made by Robert there is no question that his decision was dependent on Constans' recommendation. It is clear that because of Constans' threat to quit if Robert failed to follow his recommendation, that Robert did not exercise his independent judgment on deciding to discharge St. Martin, but instead blindly followed Constans' recommendation. In view of these circumstances, plus Respondent's concession that Constans was a statutory supervisor and an agent of Respondent, the question for decision is whether Constans was unlawfully motivated in recommending St. Martin's discharge. If so, Respondent violated Section 8(a)(1) of the Act by discharging St. Martin. *Boston Mutual Life Insurance Co. v. NLRB*, supra; *NLRB v. E.D.A. Service Corp.*, supra; *United Aircraft Corp. v. NLRB*, supra; *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, supra.

As described in detail supra, Constans' recommendation that St. Martin be terminated was the result of a series of encounters between the two which so upset Constans²² that he decided he could no longer work with St. Martin and decided to quit working for Respondent unless Robert discharged St. Martin. The series of encounters between St. Martin and Constans which caused Constans to issue an ultimatum to Respondent's owner that he would quit if St. Martin was not discharged immediately, have been set forth in detail supra. However, for purposes of deciding whether they involved concerted activity within the meaning of Section 7 of the Act, they are briefly summarized as follows.

Late in September, St. Martin formulated a proposal designed to increase the waiters' earnings by decreasing the number of waiters in Respondent's employ. He showed it to waiters Illing and Torres, who, at a mid-September meeting of employees, had previously complained that the waiters' earnings from tips had been reduced because Respondent was employing too many waiters. St. Martin asked Torres and Illing if they thought his proposal should be presented to management, and they answered in the affirmative. Immediately thereafter, St. Martin presented this proposal to Constans. He explained to Constans that under the existing system of staffing, waiters had been quitting because they

²² It is undisputed, as described supra, that, because of the volatile nature of his personality, Constans becomes upset very easily.

did not receive enough tips, but that if the proposal he had presented was adopted "the waiters" would receive more tips, therefore they would no longer quit working for Respondent. Subsequently, on approximately three other occasions, St. Martin complained to Constans Respondent was employing too many waiters.

I find that in presenting the above-described proposal to Constans that St. Martin was engaged in concerted activity. His presentation of the proposal logically grew out of the employees' concerted activity at the employee meeting at the Little City Restaurant, where some of the waiters expressed the view that their earnings had been adversely affected by Constans' employing too many waiters. Moreover, St. Martin presented the proposal after two of the waiters had authorized him to present it to management. These circumstances establish that St. Martin, in presenting his proposal to Constans, was engaged in concerted activity.²³ It is not so clear that Constans knew of the concerted nature of St. Martin's conduct when St. Martin proposed that Respondent employ fewer waiters. St. Martin said nothing to Constans which suggested that the proposal was connected with or an outgrowth of group action. On the other hand, when St. Martin explained the proposal to Constans he made it clear to him that it was being presented with the object of increasing all of the waiters' tips, not just St. Martin's. The counsel for the General Counsel also contends that in view of the small size of the work force and the workplace involved, that Constans, who admittedly knew that the waiters had met at the Little City Restaurant, must have also known that one of the complaints raised at that meeting by the employees concerned the adverse effect on the waiters' tips caused by the employment of too many waiters.²⁴ However, in view of my ultimate conclusion, I have not decided whether Constans was aware of the concerted nature of St. Martin's conduct, when he complained to Constans that the restaurant was overstaffed and proposed that the restaurant should employ fewer waiters and more busboys.

Late in September, St. Martin told Constans that, unlike the other waiters, he wanted to continue giving the busboys 15 percent of his share of the customers' tips, as was cus-

tomary in the restaurant industry, rather than the lesser amount suggested by Constans. There is no evidence that when he made this request St. Martin acted with or on the authority of other employees or was otherwise engaged in concerted activity. Rather the evidence reveals that in making this request he acted solely by and on behalf of himself.

In mid-October, St. Martin heard Constans criticizing waiter Fisher about something Fisher had allegedly done at work. As was his custom, Constans was screaming at Fisher. St. Martin interrupted Constans' criticism of Fisher by telling Constans he could not go around yelling at people. There is no evidence that when St. Martin did this he acted with or on the authority of Fisher or was otherwise engaged in concerted activity. Quite the opposite, in view of Fisher's comments at the waiters' meeting held at the Little City Restaurant, St. Martin knew Fisher did not object to Constans' manner of screaming and yelling when he spoke to Fisher and the other employees about their mistakes. Thus, when he interrupted Constans' criticism of Fisher and objected to Constans' verbal abuse of Fisher, St. Martin was acting solely by and on behalf of himself.²⁵

In mid-October, St. Martin told Constans that because of Constans' position as maitre d'-manager, St. Martin did not feel it was appropriate for him to share in the waiters' pool of tips. Constans replied management had given him that title for the benefit of the customers, but as far as the employees were concerned he was not the maitre d'-manager and should be regarded as a waiter who performed the same work and received the same wages as the other waiters. St. Martin expressed his disagreement and they argued about whether or not Constans was maitre d'-manager in name only. There is no evidence that when St. Martin questioned the appropriateness of Constans' sharing in the waiters' pool of tips and when he argued with Constans about his position as maitre d'-manager, that St. Martin acted with or on the authority of other employees or was otherwise engaged in concerted activity. Rather the evidence reveals that when he engaged in this conduct St. Martin acted solely by and on behalf of himself.

Beginning in or about July and continuing until his November discharge, St. Martin frequently complained to Constans that Respondent's owner, Jacques Robert, did not pay the employees enough money, that the waiters were in effect paying the wages of all the other employees employed by the restaurant, that St. Martin's girlfriend, who just started work as a cocktail waitress at another restaurant, earned more money than St. Martin, and asked Constans for an explanation concerning these complaints. Constans repeatedly responded by telling St. Martin to speak about his complaints to Robert, the owner of the restaurant, and told him to ask Robert to show him the restaurant's books and records, if he thought Robert was not paying the employees enough money. Constans also told St. Martin that he, Constans, was not responsible for the employees' wages, that he was not a member of management and was only interested in providing good service to the customers. Nonetheless, St. Martin repeatedly expressed the above complaints to Constans. There is no evidence that when St. Martin repeatedly complained to Constans that Respondent was not paying its employees

²³The record reveals that the employees' complaint the restaurant was staffed with too many waiters, and that St. Martin's staffing proposal, which was designed to remedy that complaint, were directly related to the employees' terms and conditions of employment, namely, their earnings from customers' tips. I recognize that some concerted activity bears a less immediate relationship to employees' interests than other such activity and that at some point that relationship can become so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection cause" of Section 7 of the Act. Here, however, there is a direct and immediate relationship between the tips earned by Respondent's waiters, which constitute 75 percent of their earnings, and the number of waiters employed by Respondent; the more waiters employed on a shift, the less money in the pool of tips which the waiters can divide among themselves.

²⁴The waiters who met in mid-September at the Little City Restaurant, following that meeting arrived for work late, and one of the waiters explained to Constans that they were late because they had been to a meeting. There is no evidence that Constans was also informed of what had taken place at the meeting. Other than St. Martin's conversations with waiters Illing and Torres concerning his proposal that Respondent employ fewer waiters, there is no evidence that any of the waiters, while at work or otherwise on Respondent's premises, discussed the complaints that were raised during the Little City Restaurant meeting. Under the circumstances, even though the employing enterprise involved in this case is a small one, I have serious doubts that it would be appropriate to infer Constans knew that a group of employees were complaining that he was verbally abusing them and was employing too many waiters. See *Mantack Corp.*, 231 NLRB 858 fn. 2 (1977).

²⁵As I have indicated *infra*, if I have erred in reaching this conclusion it does not affect the ultimate result of this case.

enough money and that it was the waiters who were in effect paying the wages of the rest of the restaurant's employees, that St. Martin acted with or on the authority of other employees or was otherwise engaged in concerted activity. Rather the evidence reveals that when he engaged in this conduct St. Martin acted solely by and on behalf of himself.

On November 2, after learning the previous day that under a newly enacted law Respondent was legally obligated to raise his wages and the wages of the other waiters and busboys retroactive to July 1, St. Martin submitted a slip of paper to Constans which contained the number of retroactive days St. Martin claimed Respondent was obligated to pay him under the new law. Previously Respondent's owner had informed St. Martin that waiter Robyn Fisher was computing the employees' retroactive pay and that if St. Martin wanted to know anything about that matter to speak to Fisher. It is also undisputed that Constans previously had also informed St. Martin, when St. Martin spoke to him about the retroactive pay, that Constans had nothing to do with that matter and that Fisher had been assigned by the owner to compute the employees' retroactive wages. Thus, on November 2, when St. Martin handed Constans the slip of paper with the number of retroactive days St. Martin claimed Respondent was obligated to pay him under the new law, Constans repeated what he had already told St. Martin; that Fisher was the person responsible for computing the employees' retroactive pay.²⁶ St. Martin responded by stating that Constans, as the maitre d'-manager, should be responsible for that matter, rather than Fisher, and asked whether Fisher was now the maitre d'. Constans replied by indicating, as he had done earlier when he and St. Martin had argued about Constans' role as maitre d'-manager, that he did not consider himself as the maitre d' insofar as the dining room staff was concerned, and asked if St. Martin intended to start arguing with him about that subject again. St. Martin answered, "How can I start if I never stopped." There is no evidence that when St. Martin submitted the claim for his own retroactive wages and took the position that Constans, rather than Fisher, should be responsible for the matter, that St. Martin acted with or on the authority of other employees or was otherwise engaged in concerted activity. Rather the evidence reveals that when he engaged in this conduct, St. Martin acted solely by and on behalf of himself.

As I have described in detail supra, Constans' decision to quit his employment unless St. Martin was terminated was motivated by his above-described series of encounters with St. Martin which upset him. Regarding the encounter which triggered this decision, Constans testified, as described supra, that his decision to quit unless St. Martin was terminated was triggered by the fact that even though it had been made clear to St. Martin that Fisher, not Constans, was responsible for computing the employees' retroactive backpay, and even though it had been made clear to St. Martin that Constans viewed himself as maitre d'-manager in name only and not for managerial purposes, St. Martin raised both of these issues once again on November 2. Constans further testified, as described supra, that when Constans at the time asked whether St. Martin intended to start discussing those issues with him again, St. Martin's answer, "How can I start if I

never stopped?"', led Constans to believe St. Martin never intended to leave him alone and would never accept what Constans told him, therefore, Constans testified, he decided to quit his employment if St. Martin was not terminated and communicated his decision to Respondent's owner. The aforesaid testimony, when considered in the light of the whole record, was not inherently implausible. Also, Constans' testimonial demeanor was good when he gave this testimony and the testimony was corroborated, in significant part, by the testimony of General Counsel's witness Illing, that Constans admitted to her that St. Martin's discharge had been triggered by an argument between Constans and St. Martin concerning Constans' position in the restaurant, whether he was a waiter or the maitre d'-manager.

Based on the foregoing I find that the overwhelming majority of the series of St. Martin's complaints, for which St. Martin was discharged, did not involve concerted activity.²⁷ Accordingly, I find that Respondent would have discharged him even absent his concerted activity. *Mazer Chemicals*, 270 NLRB 241 fn. 3 (1984); *Damon House, Inc.*, 270 NLRB 143 (1984). I therefore shall recommend the dismissal of the complaint's allegation concerning St. Martin's discharge.

Even assuming St. Martin's complaints about the overstaffing of the restaurant and Constans' verbal abuse of waiter Robyn Fisher constituted concerted activity protected by the Act and Constans was aware of the concerted nature of that conduct, I would still find Respondent has established that even absent those complaints, Constans would have recommended St. Martin's discharge because of the remainder of the complaints, none of which constituted protected concerted activity. As described supra, St. Martin upset Constans by requesting that the busboys receive 15-percent of St. Martin's share of the tips and that Constans not share in the waiters' pool of tips. These complaints, as I have found supra, did not constitute concerted activity. He further upset Constans by continually complaining that Respondent's owner was not paying his employees enough money and that it was the waiters who were in effect paying the wages of the other employees, and continued to voice these complaints to Constans even after Constans repeatedly told him to speak to Respondent's owner about his complaints because Constans was not responsible for the employees' wages and was not a part of management. These complaints, as I have found supra, did not constitute concerted activity. Also, as described supra, even though it was made clear to St. Martin that Constans had nothing to do with the computation of the employees' retroactive pay due under the newly enacted minimum wage law, St. Martin continued to insist that Constans, in view of his title of maitre d'-manager, should be the person responsible for handling that matter, and even though Constans repeatedly explained to St. Martin that he regarded himself as maitre d'-manager in name only and not for managerial purposes, St. Martin continued to argue with Constans about Constans' position with Respondent. Their argument came to a head on the day of St. Martin's discharge when, after St. Martin once again raised the matter of Constans' responsibility for seeing to the computation of St. Martin's retroactive pay because of Constans' position as

²⁶On November 2, earlier in the day, St. Martin had in fact given Fisher the identical retroactive wage information. St. Martin did not explain why, under the circumstances, he also submitted this information to Constans.

²⁷In view of this conclusion, I have not considered Respondent's further contention that the overwhelming majority of St. Martin's complaints to Constans were made in bad faith for the sole purpose of making Constans lose his temper therefore they did not constitute protected concerted activity.

maitre d', Constans asked if St. Martin intended to start arguing with him again about his role as maitre d' and his responsibility for seeing to the computing of the backpay. St. Martin responded by indicating to Constans that he would never stop arguing with Constans about those matters,²⁸ whereupon Constans lost his temper and decided to quit unless St. Martin was discharged. In the light of these circumstances, I find Respondent has established that even absent St. Martin's complaints about overstaffing and Constans' verbal abuse of waiter Fisher, that Constans would have recommended St. Martin's discharge because of the remainder of his complaints, none of which constituted concerted activity within the meaning of Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By prohibiting its employee Anthony St. Martin from posting on its bulletin board a newspaper article describing a newly enacted law requiring Respondent has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

3. The a foresaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has otherwise not violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

The Respondent, Alchris Corp. d/b/a Amelio's, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow employees to post notices relating to protected concerted activities on bulletin boards that are available for general use by employees.

²⁸ As I have found supra, in arguing about those matters St. Martin was not engaged in concerted activity.

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in San Francisco, California, copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that the Respondent violated the Act other than found herein.

³⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to allow employees to post notices relating to protected concerted activities on bulletin boards that are available for general use by employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ALCHRIS CORP. D/B/A AMELIO'S